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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TAYLOR BACKHOE SERVICE, INC.,

Defendant and Respondent,

v.

MARK BAKER,

Plaintiff and Appellant.

F076424

(Super. Ct. No. 2009973)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of T. Mae Yoshida and Shogo J. Garcia, for Plaintiff and Appellant.

Law Offices of John A. Baird, Craig D. Trippel and Steven R. Myers, for Defendant and Respondent.

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Plaintiff Mark Baker sued defendant Taylor Backhoe Service, Inc., for negligence after he was injured while working with a Taylor employee on a construction site. The trial court granted Taylor's motion for summary judgment, relying on the doctrine of primary assumption of risk as a complete defense. Baker appeals, arguing that Taylor's motion did not establish the elements of that defense. We agree and reverse the judgment.

FACTS AND PROCEDURAL HISTORY

Baker's complaint alleged that negligent conduct by Taylor's employee, Mac, was at least partly the cause of physical injuries Baker sustained while the two were working for different contractors on a construction site. Baker worked for Collins Electric.

Taylor filed a motion for summary judgment, based primarily on the doctrine of primary assumption of risk. Relying solely on Baker's own deposition testimony, Taylor asserted that the following facts were undisputed:

On the date of the accident, Mac, Baker, and Baker's supervisor, Matt Paine, were working on the site. The task at hand was to drive several 10-foot steel rods into the ground through openings in concrete vaults for street lights, which had been installed previously. The purpose of the rods was to ground the electrical circuit that would power the street lights. In the usual method of installing these, the rod is held upright with its end in the opening, and a 30-pound jackhammer is attached to a device that grasps the rod from the side and uses the jackhammer's motion to ratchet the rod down into the ground. This method allows the jackhammer operator to stand on the ground while driving the rod. Baker used this method successfully on a number of rods, but then reached a place where the ground was packed too hard and the next rod would not go in. Paine retrieved a 90-pound jackhammer, brought it to Baker and Mac, laid it down in some mud, and told Baker and Mac to use it to drive the rods in. Then Paine left.

The attachment on the end of the 90-pound jackhammer was not designed to drive a rod from the side. It could only attach to the rod at the top. This meant the jackhammer

operator needed to be 10 feet in the air to carry out the task. There was no bucket truck on the site, so Baker and Mac decided to use Taylor's backhoe. Baker took the larger jackhammer and got in the digging bucket of the backhoe. When he was at the necessary height, Baker fitted the attachment onto the top of the rod and began jackhammering. But the attachment was clogged with mud and it slipped off the rod. To prevent it from falling on Mac, who was standing below, Baker maintained his grasp on the jackhammer with one hand, and grabbed a part of the digging bucket with the other to keep from falling out himself. This maneuver caused Baker's injuries.

In his opposition to the motion, Baker conceded that all these facts were undisputed. He asserted that several other facts also were undisputed: It was Mac who drove the backhoe to the spot where they were working, and who operated it to raise Baker in the air. Then Mac got off the backhoe, stood the rod up, and held it in place. Taylor did not raise any dispute about these facts.

Taylor's argument was that primary assumption of risk was established as a complete defense because Baker "voluntarily agreed to undertake the inherent risks in the activity." Baker maintained that the facts relied on by Taylor did not establish the elements of the defense.

The trial court granted the motion on grounds of primary assumption of risk. Its written order stated that Baker "possessed the experience to install the grounding rods and he should have known better than to use a jackhammer full of mud from the backhoe bucket 'platform,'" and he "willingly assumed the risk inherent in installing the grounding rod from the backhoe bucket."

DISCUSSION

I. Summary Judgment Standard and Standard of Review

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58

Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) We view the facts in the light most favorable to the nonmoving party and assume that, for purposes of our analysis, his version of all disputed facts is correct. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159.) A moving defendant can establish its entitlement to summary judgment by either (1) demonstrating that an essential element of the plaintiff's case cannot be established, or (2) establishing a complete defense. (Code Civ. Proc., § 437c, subd. (o).)

II. Analysis

A. Primary Assumption of Risk

Baker was correct when he argued in the trial court that Taylor's motion did not establish the elements of the defense of primary assumption of risk. He also is correct in arguing now that the trial court misunderstood the doctrine of primary assumption of risk when it ruled that the defense was established because Baker "willingly assumed the risk" involved in the particular task he was doing, and "should have known better." Since the establishment of the modern doctrine of primary assumption of risk in *Knight v. Jewett* (1992) 3 Cal.4th 296, the application of the doctrine to an occupational injury "cannot properly be said to rest on the [worker's] voluntary acceptance of a known risk of injury in the course of employment." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 541 (*Neighbarger*).) "The doctrine of primary assumption of risk is not about what the plaintiff knew and when she knew it, or … a 'plaintiff's subjective, voluntary assumption of a known risk.'" (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1767 (*Herrle*).)

The doctrine in its modern form instead states that there are certain occupations—including firefighter, veterinarian, and others—that involve inherent risks for which it would be contrary to public policy to impose negligence liability for injuries caused by certain prospective defendants. For these occupations and these defendants, a worker cannot recover for an injury sustained while working and caused by a defendant's negligence, if the injury arose from an inherent risk of the occupation and the defendant did nothing to make the risk greater than that which was inherent.

Consequently, to establish the affirmative defense of primary assumption of risk on summary judgment, a defendant must show two things: (1) The occupation at issue is one of the kinds of occupations to which the doctrine applies and the defendant is a defendant who can benefit from the doctrine under the circumstances; and (2) the plaintiff's injury arose from inherent risks of the occupation and not increased risks created by the defendant. (See *Neighbarger, supra,* 8 Cal.4th at pp. 538-541 [discussing factors to be considered when determining whether doctrine applies to a particular occupation]; *Gregory v. Cott* (2014) 59 Cal.4th 996, 1010-1011 (*Gregory*) ["primary assumption of risk does not bar recovery when the defendant's actions have unreasonably *increased* the risks of injury beyond those inherent in" the occupation, i.e., the "ordinary risks" that arise in "the course of … employment" in the occupation].) We will take these two elements—the nature of the occupation and the relationship between the injured worker and the injury-causing defendant, on one hand, and the inherentness of the risk from which the injury arose on the other—in turn, and explain that Taylor's motion for summary judgment presented little about either of them.

1. Applicability of the Doctrine to Baker's Occupation and to the Relationship Between Him and Taylor

In *Gregory,* the California Supreme Court surveyed some cases illustrating the application of the first question, whether the doctrine applies to the occupation at issue given the relationship between the parties. The court stated that the answer to this

question "in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra*, 59 Cal.4th at pp. 1001-1002.) *Normally*, the duty to avoid causing injury applies to workers doing dangerous work just as it applies to anyone else, so it is necessary to consider carefully before concluding that the defense applies to a situation. (*Id.* at p. 1002.)

One application is the scenario in which the defendant is deemed to have hired the plaintiff just for the purpose of encountering the danger. The firefighter's rule is an example. An individual who negligently starts a fire that injures a firefighter is not liable because that individual is regarded as a member of the public that hired the firefighter to encounter danger in fighting fires. The law views it as unfair to impose liability on the defendant in that situation. Another example in which fairness is viewed as a factor is the situation in which a customer negligently fails to warn a veterinarian that his or her dog has a history of biting. The customer is not liable when the dog bites the veterinarian because the customer has hired the veterinarian for, among other things, the veterinarian's professional skill in managing dogs. A further consideration in the veterinarian situation is that the employment of veterinarians to tend to the health of animals is socially desirable and could be deterred by a rule of liability for injuries of this sort. (*Gregory, supra,* 59 Cal.4th at pp. 1002-1003.)

Taylor's motion for summary judgment never even discussed aspects of Baker's occupation or his relationship with Taylor that would show Taylor should be shielded from liability. Assuming this question is one of law (see *Herrle, supra*, 45 Cal.App.4th at p. 1767), Taylor as the moving party still was required to present reasoned arguments to the trial court about why the particular occupation at issue was one to which the doctrine applies, and why the defendant was the sort of defendant to which the defense was available. It did not. It pointed out that there were dangers associated with Baker's job, but that is not enough.

Taylor has cited *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427 both in its moving papers and on appeal. In its moving papers, Taylor merely observed that *Moore* is an instance of the application of primary assumption of risk to occupational injuries, but in its appellate brief it added a quotation: "'"[I]t is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant had contracted with the plaintiff to remedy or confront."'" (*Id.* at p. 435.)

If we were to view this quotation charitably as an argument for viewing Baker's job as the sort of job to which the doctrine should apply, and Taylor as the sort of defendant that can take advantage of it, it would still be difficult to credit Taylor with making a serious attempt to establish this point. It obviously is not the case that Taylor contracted with Baker to remedy or confront the hazard of sustaining injury during dangerous jobs involving jackhammering out of raised backhoe buckets. Taylor did not hire Baker to take on any dangerous tasks. It did not hire him at all. It did not hire him directly, as a pet owner hires a veterinarian. It did not hire him indirectly, as the public hires firefighters through fire departments. Taylor was a contractor on a job site, and Baker was simply an employee of a different contractor on the site. Taylor's motion did not try to show what features of Baker's job would make it suitable for application of the doctrine of primary assumption of risk by a defendant like Taylor as a defense against claims based on work injuries.

2. Inherent Risk

If it has been determined that a plaintiff was injured while engaged in an occupation to which primary assumption of risk can apply, and a defendant is so related to the plaintiff as to be entitled to use the defense, the next question is whether the injury arose from the risks inherent in the occupation or from other or greater risks caused by the defendant. This can be a question of fact unresolvable on summary judgment even

when the court determines as a matter of law that the activity in question is one to which primary assumption of risk can properly be applied between the parties.

Shin v. Ahn (2007) 42 Cal.4th 482 is a case on recreational activities and not occupations, but the principles are the same and it illustrates this point. The plaintiff, a golfer, was injured when the defendant, another golfer, hit him on the head with a ball. Our Supreme Court stated that, as a matter of law, primary assumption of risk can bar liability for injuries a golfer causes another golfer while both are golfing; but the evidence presented in the defendant's motion for summary judgment was insufficient to settle the parties' dispute over whether the defendant acted recklessly by driving his ball when the plaintiff was within range. This could have meant the plaintiff's injury arose from a risk made greater by the defendant, and consequently that the defense was not available to the defendant. The question of whether the defendant's action created a risk beyond the risks inherent in golf thus was a question of fact to be resolved at trial. (*Id.* at pp. 486-487, 500.)

To prevail on summary judgment, Taylor would have had to present evidence supporting the contention that its actions did not increase the risk that Baker would be injured in the manner he was injured, beyond the risk inherent in his occupation. Taylor's brief betrays an awareness of the need to show this, but its efforts in that direction are meager.

It avers, for example, that the undisputed facts show "the backhoe did not move" as Baker was being injured, and "the backhoe did nothing" to cause the injury. These remarks overlook the evidence that Taylor's employee agreed with Baker to use the backhoe to carry out the task they had been charged with, drove the backhoe to the location where it was needed, raised the bucket with Baker standing in it, and supported the rod while Baker tried to drive it in with the jackhammer. Did these actions on the employee's part create risks beyond those inherent in Baker's job? To answer this, we would need to know such things as what job, exactly, Baker had; what the ordinary duties

of that job were; what risks were associated with those duties; and whether the aerial backhoe jackhammering scheme Taylor's employee helped to plan and execute made those risks worse. Taylor's motion for summary judgment was not supported by evidence on these topics.

B. Causation

Taylor makes a backup argument to the effect that the undisputed facts show it did nothing to *cause* Baker's injuries and cannot be liable for negligence for this reason. This contention lacks merit.

A party moving for summary judgment based on a claim that the plaintiff will not be able to prove an element of a cause of action says in effect that the undisputed facts are inconsistent with the existence of the element and there is no evidence the plaintiff can produce to show otherwise. But the evidence on which Taylor relies—i.e., Baker's deposition testimony—is not at all inconsistent with the existence of the causation element of negligence.

Instead, it supports the existence of triable questions of fact regarding causation. When he agreed to help install the rod using the backhoe, drove the backhoe into position, operated it to raise Baker into the air, and then got off the backhoe and held the rod in position, did Taylor's employee engage in acts that were a substantial factor in causing, and a proximate cause of, the injury? Nothing in the record suggests Baker will be unable to prove he did.

(The reader will have noticed by now that this argument is very similar to Taylor's argument about how it did not increase the risks of Baker's job. It is essentially the same idea applied to one of the elements of the cause of action, negligence, instead of one of the elements of an affirmative defense, primary assumption of risk.)

At oral argument, Taylor's counsel undertook to expand the causation argument by asserting that, according to the undisputed facts, Baker's injury was unrelated to the

fact that he was elevated above the ground. The same injury would have happened, counsel contended, without Mac or the backhoe.

The undisputed facts indicate no such thing. The facts asserted in Baker's deposition testimony, on which both parties rely, are incompatible with the notion that Baker would have sustained the same injuries if he had remained on the ground. On the ground, he could not use the 90-pound jackhammer because the attachment required it to be connected to the top of the rod. Had Baker been on the ground using the other jackhammer, the jackhammer would not have gotten out of his control, because the attachment for that jackhammer was not full of mud, the jackhammer weighed only 30 pounds, and would already have been resting on the ground, with nowhere to slip down to. Even if it had gotten out of his control somehow, he would not have had to make sure he held onto it to stop it from falling on Mac, since Mac could not have been standing under him had he been on the ground. Taylor's motion did not come close to showing Baker failed to produce evidence indicating triable issues of fact regarding causation.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant Mark Baker. The matter is remanded to the trial court for proceedings consistent with this opinion.

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SMITH, J.

WE CONCUR:

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DETJEN, Acting P.J.

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FRANSON, J.